No.

IN THE

Supreme Court of the United States

NINA SCHRODER MAGNESS and
AGNES SCHRODER ATKINS

Petitioners

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, and RUSSIAN STATE DIAMOND FUND

Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners Nina Schroder Magness' and Agnes Schroder Atkins' father, Ivan Karlovitch Schroder, owned and operated a Piano Factory in St. Petersburg, Russia. The property was seized by the government during the Russian Revolution. Under current Russian law prohibiting the nationalization or expropriation of foreign investments, the Petitioners regained title to the properties. However, the Russian Federation and the Ministry of Culture re-nationalized the properties.

The Russian Federation appeared and was represented by counsel in this matter at a TRO hearing. Thereafter, the plaintiffs served all of the defendants with process. None of the defendants answered the complaint. The District Court entered a final Default Judgment and filed findings of fact and conclusions of law. Subsequently, Defendants filed a Motion to Vacate Judgment contending improper service under the Foreign Sovereign Immunities Act. The District Court denied the Motion to Vacate the Judgment, because the Court determined the Defendants received actual notice of the proceedings and such service substantially complied with the Foreign Sovereign Immunities Act.

The questions presented in this case, as to which the courts of appeal are in conflict, is as follows:

(1) Whether the Magness Plaintiffs, pursuant to the service provisions of the Foreign Sovereign Immunities Act, properly perfected service of process upon the Russian Defendants, where the Defendants received actual notice of the proceedings, and where Plaintiffs substantially, not strictly, complied with the service provisions of the Act.

(2) Whether a general appearance by a defendant at a TRO hearing, where actual knowledge of the suit is received, waives any defect in service subsequently perfected.

LIST OF PARTIES

Petitioners: Nina Schroder Magness
Agnes Schroder Atkins
Lee Alexander Magness

Respondents: Russian Federation
Russian Ministry of Culture
Russian State Diamond Fund

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nina Schroder Magness and Agnes Schroder Atkins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1-17) is reported at 247 F. 3d 609. The opinion of the judgment of the district court (App., *infra*, A18-29) is reported at 54 F. Supp. 700. The opinion of the order denying Motion to Vacate Judgment of the district court (App., *infra*, A30-36) is reported at 79 F. Supp. 765. The opinion of the order denying Writ of Execution of the district court (App., *infra* A37-42) is reported at 84 F. Supp. 1357; amended 2000 U.S. Dist. LEXIS 1278.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (a-b), are reproduced at App., *infra*, A42-44.

STATEMENT

In this case, the Court must decide whether substantial compliance with the Foreign Sovereign Immunities Act is the test for obtaining personal jurisdiction over foreign defendants. However, the real issue in this proceeding is whether a foreign government may flaunt the rule of international law that governs its dealings with United States citizens. Petitioners' property-worth hundreds of millions-was restored to them under the law and then, summarily, repossessed by the defendants, who sold it for profit. The defendants knew of, but blatantly ignored, Petitioners' attempts to obtain restitution through orderly legal process. Their embassy spokesman stated their attitude: "Only Russian courts can tell Russians what to do." (R. at 650) At stake are the rights and interests of all U.S. citizens who do business or own property in foreign lands.

A. Service of Process under the FSIA

Service of process on a foreign state or an agency or instrumentality of a foreign state is perfected in accordance with 28 U.S.C. § 1608, the Foreign Sovereign Immunities Act.

The Fifth Circuit's ruling in this case departs from the standard practice within the circuit of, to be effective, service under section 1608 must substantially comply with the Act. Hittner, Schwarzer, Toshuma & Wagstaffe, Federal Civil Procedure Before Trial, Chapter 5 § 253 (Rutter Group, 1996) (5th Cir. Ed.). (citing *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). Additionally, several jurisdictions have consistently upheld service where the serving party "substantially complied" with the requirements of the Act, so long as actual notice was received. *Velidor v. L/P/G/ Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), cert. dism'd, 455 U.S. 929, 102 S. Ct. 1297, 71 L. Ed. 2d 474 (1982); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir.), cert. denied, 126 L.Ed.2d 41, 114 S. Ct. 72 (1983); *Harris Corp v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Obenchain Corp. v. Corporation Nacionale de*

Inversiones, 665 F. Supp. 435, 437 (W.D. Pa. 1987), aff'd in part, rev'd in part, 898 F.2d 142 (3d Cir. 1990); *Banco Metropolitano, S.A. v. Desarrollo de Autopistas v. Carreteras de Guatemala*, 616 F. Supp. 301, 304 (S.D.N.Y. 1985).

The only true complaint in regard to service on the Russian Federation and Russian Ministry of Culture cited by the Fifth Circuit is that Petitioners failed to comply with the requirement of section 1608(a)(3) and (a)(4), because they did not serve a copy of the summons and complaint on the Russian Ministry of Foreign Affairs, but instead, served Boris Yeltsin, then President of the Russian Federation and the "representative of international relations" under the Russian Federation Constitution. As such, the Court erroneously reasoned that the Russian defendants did not receive actual notice of the suit. The Fifth Circuit's position is legally and factually in error, because the Russian Defendants were present and argued the merits of this matter at a TRO hearing; as well as, admitting in open court before the Fifth Circuit that they had actual notice of the suit. Additionally, the district court's docket sheet indicates that the Russian Defendants received notices from the clerk routinely throughout the pendancy of the matter.

B. Waiver of Defect in Service of Process

The Russian Federation entered a general appearance at the injunction hearing and admittedly had actual knowledge of the case, yet it remained silent regarding its' personal jurisdiction defense for more than two years, until judgment was entered against it. The Fifth Circuit's ruling that the Russian Federation did not waive a personal jurisdiction defense through a general appearance is legally erroneous.

In July 1997, both Attorney Dickinson and Attorney Cook appeared at the TRO hearing on behalf of the Russian Federation, and both announced their representation on the record in open court. (TRO hearing TR. 2, 15, 26). Neither Mr. Dickinson nor Mr.

Cook stated, or even suggested, that their representation was limited to the TRO hearing. See *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F.Supp. 73 (S.D.N.Y. 1980) (counsel for Iran appeared specially, only for purposes of the joint confirmation hearing, and stated they were not authorized to accept process on behalf of their clients). In addition, counsel did not limit their participation at the TRO hearing to matters concerning only the TRO. Instead, counsel engaged in a discussion of the separate substantive basis of the plaintiffs' underlying lawsuit. (TRO TR 2-39)

Given the split among the circuits it is time for this Court to address the questions presented. At stake are the rights and interests of all U.S. citizens who do business or own property in foreign lands. The Fifth Circuit's ruling allows the Russian Federation to flaunt the rule of international law that governs its dealings with United States citizens. The Russian Federation's repudiation of the authority of U.S. courts and the rights of its' citizens is a longstanding practice that must be addressed without further delay. In *Gregorian v. Izvesta*, 658 F. Supp. 1224 (Central Dist.—Calf. 1987) service of process was made in strict compliance with Foreign Sovereign Immunities Act by the U.S. State Department on the USSR. Despite even being served under strict compliance with the FSIA, the Foreign Minister of the USSR responded by rejecting service and returning the court documents stating "the Soviet State and its organs enjoy immunity from jurisdiction of foreign courts." Embassy Moscow's Internal Translation of the Soviets Union's Rejection of Service, attached to Department of State letter to Court of September 25, 1985. The Russian Federation embassy spokesman, Mr. Shurgalin, now fourteen years later echoes the same statement in this case on October 13, 1999, in the Wall Street Journal article. "Only Russian courts can tell Russians what to do". (R. at 650) The court in *Gregorian* concluded "setting aside the default judgment for the justifications that the State Department has provided would represent a giant step backward to the days before the

FSIA in which legal determinations were made by the executive branch and litigants were provided no predictability or assurance of due process. There is little that is extraordinary about the circumstances which brought about the default judgment; defendants' beliefs led them to a free, calculated, and deliberate choice not to appear when summoned. They may not now escape the consequences of their actions by exerting exactly the type of pressure that Congress has sought to eliminate." 658 F.Supp. at 1239.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split as to whether "substantial compliance" or "strict compliance" is the applicable standard for service of process under the Foreign Sovereign Immunities Act, and, because the Fifth Circuit reached a decision in this case that is erroneous as a matter of statutory interpretation and law and seriously infringes on the rights and interests of all U.S. citizens who do business or own property in foreign lands.

1. THE CIRCUITS ARE SPLIT AS TO WHETHER "SUBSTANTIAL COMPLIANCE" OR "STRICT COMPLIANCE" IS THE APPLICABLE STANDARD OF REVIEW FOR SERVICE OF PROCESS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Fifth Circuit's ruling that strict compliance with section 1608 (a) is required and that service on the Russian President instead of the Minister of Foreign Affairs is fatal to the judgment incorrectly interprets the standard of review for service under the FSIA. Hittner, et al., at 5:253 (substantial compliance is sufficient under section 1608). (citing *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). The majority of circuits have adopted the substantial compliance test.

For example, the Eleventh Circuit addressed the issue in *Harris Corp v. National Iranian Radio and Television* and found service

to be sufficient despite technical noncompliance with Foreign Sovereign Immunities Act requirements. 691 F.2d 1344, 1352 (11th Cir. 1982). The court recognized that Congress has established a "flexible framework" of acceptable methods of service to assure that foreign defendants will get actual notice. Id. at 1352 n.16. Because the defendant did not deny that it had actual notice, the technical deficiencies complained of did not defeat service. Id. at 1352. While the Court admonished litigants to follow the FSIA service provisions, it concluded that a failure to follow precisely the steps that are designed to insure that actual service is made should not override and invalidate the fact that actual notice was received. Id. at 1352. In other words, if the objective of actual notice is met, it would be senseless to negate the result on technical grounds.

In *Velidor v. L/P/G Benghazi* the Third Circuit also concluded that actual notice was more important than strict compliance with the technical requirements of the Foreign Sovereign Immunities Act. 653 F.2d 812, 821 (3d Cir. 1981), cert. dism'd, 455 U.S. 929, 102 S. Ct. 1297, 71 L. Ed. 2d 474 (1982). Velidor, a seaman, brought an action against a ship and an instrumentality of the Algerian and Libyan governments that owned the ship. The plaintiff served the ship's master. The issue was whether the master of a ship is an "agent" for purposes of receiving process under the Foreign Sovereign Immunities Act. The court looked to the congressional intent in enacting section 1608 and opined:

> Rather than making service on foreign instrumentalities a rigid, technical or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice.

Velidor, 653 F.2d at 821.

Because the officers of the company owning the ship received immediate notice of the suit after service on the ship's master, the court concluded that service was sufficient under the Foreign Sov-

ereign Immunities Act. See also *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 706-707 (D.C. 1985) (service on Argentine Naval Commission as a "foreign state" under section 1608(a) satisfied substantial compliance test).

The district court in *Banco Metropolitano, S.A. v. Desarrollo de Autopistas v. Carreteras de Guatemala* reached a similar conclusion. 616 F. Supp. 301, 304 (S.D.N.Y. 1985). In that case, the plaintiff failed to serve a translation on the defendants. The court ruled that because the foreign defendant had actual knowledge of the summons and complaint, substantial compliance with the Foreign Sovereigns Immunity Act had been achieved. Id. at 304.

Similarly in *Obenchain Corp. v. Corporation Naciònale de Inversiones*, the plaintiff, rather than the clerk of the court, served the complaint, and plaintiff failed to include the required notice of suit. 665 F. Supp. 435, 437 (W.D. Pa. 1987), aff'd in part, rev'd in part on other grounds, 898 F.2d 142 (3d Cir. 1990). The court concluded that, despite such technical omissions, where substantial compliance with the FSIA results in actual notice, the purpose of the Act has been satisfied. Id. at 437; see also *Straub v. Atlas Turner*, 38 F.3d 448, 453-54 (9th Cir. 1994) (failure to serve the complaint through the clerk of the court did not deprive the district court of jurisdiction so long as defendant received actual notice of the lawsuit).

Moreover, in *Sherer v. Construcciones Aeronauticas, S.A.*, the Sixth Circuit, adopted the substantial compliance test, stating concisely the reasoning for the substantial compliance rule:

> The better rule permits the assertion of personal jurisdiction where substantial compliance has effected actual notice. The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation. Where a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied.

987 F.2d 1246, 1250 (6th Cir. 1993), cert. denied, 114 S. Ct. 72, 126 L.Ed.2d 41 (1993).

2. A GENERAL APPEARANCE BY A DEFENDANT AT A TRO HEARING, WHERE ACTUAL KNOWLEDGE OF THE SUIT IS RECEIVED, WAIVES ANY DEFECT IN SERVICE SUBSEQUENTLY PERFECTED

The Fifth Circuit's ruling that the Russian Federation did not waive its defense of personal jurisdiction when it participated in the injunction hearing without alerting the court or the parties to the issue is erroneous and a departure from prior Circuit holdings. See, *Trust Co. of Louisiana v. N.N.P. Inc.*, 104 F.3d 1478, 1487 (5th Cir. 1997); *Broadcast Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 281 (5th Cir. 1987); *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543 (3d Cir. 1967). Wyrough, like this case, was an action for damages and injunctive relief. The defendant did not file any motions or responsive pleadings prior to the preliminary injunction hearing, but at the hearing it entered an appearance and contested the plaintiff's right to injunctive relief. 376 F.2d at 545. Sixteen days later, the defendant filed a motion to dismiss the action on various grounds, including a lack of personal jurisdiction. Id.

The district court, and then the court of appeals, determined that the personal jurisdiction defense had been waived. The court of appeals explained that "there . . . exists a strong policy to conserve judicial time and effort; preliminary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or quasi-merits of a controversy." Id. at 547. Applying that policy, the court held:

> In [an injunction] hearing the court resolves factual disputes and will either grant or deny the relief sought. Even though its conclusion is not determinative of the ultimate results of the litigation, we hold that under the circumstances present here a party who participates in such a proceeding must be deemed to have waived the defense of lack of personal jurisdiction.

Id.

The Fifth Circuit had previously not tolerated a late-raised defense based on personal jurisdiction. See, e.g., *Trust Co. of Louisiana v. N.N.P. Inc.*, 104 F.3d 1478, 1487 (5th Cir. 1997); *Broadcast Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 281 (5th Cir. 1987). In *Broadcast Music*, the court explained:

> The Federal Rules do not in any way suggest that a defendant may halfway appear in a case, giving plaintiff and the court the impression that he has been served, and, at the appropriate time, pull failure of service out of the hat like a rabbit in order to escape default judgment.

811 F.2d at 281. The Court in the present matter attempted to distinguish *Broadcast Music* by stating that the defendant's in that case actively participated in events surrounding the case by accepting deposition notices, engaging in settlement discussions and attending pretrial meetings; whereas, they opined, such activity was not present in this case. The Court's distinction is in error. In addition to attending the TRO hearing counsel for Plaintiffs had numerous discussions with counsel for the Defendants, and, the District Court's docket sheet evidences that Defendant's counsel received numerous notices from the clerk of the court.

3. CONGRESSIONAL INTENT MANDATES ADHERENCE TO THE SUBSTANTIAL COMPLIANCE TEST

As a matter of policy, several courts have held that actual notice to a foreign defendant is more important than strict compliance with the technical requirements of the FSIA. See, e.g., *Sherer*, 987 F.2d at 1248, citing *Velidor*, 653 F.2d 812. In reaching this result, the court in *Sherer* relied in part on Congressional intent, which supports application of the substantial compliance test:

> Rather than making service on foreign instrumentalities a rigid, technical or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice.

Sherer, 987 F.2d at 1248, citing H.R. Rep. No. 94-1487 at 23-24.

Accordingly, the court held as a matter of policy that "failure to follow precisely those steps in § 1608 designed to insure that actual service be made should not override and invalidate the fact that . . . notice was actually received." Id., citing *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982).

The legislative history of the Foreign Sovereign Immunities Act reveals that actual notice of the suit by the Foreign Sovereign, regardless of the manner in which the papers are transmitted, fulfills the requirement of service under the Act.

> "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has **actual notice of the suit**. H.R. Rep. No. 94-1487, P. 24 (1976) (emphasis added)

CONCLUSION

The petition for writ of certiori should be granted.

Respectfully submitted,

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July 2001

IN THE

United States Court of Appeals

For the Fifth Circuit

No. 00-20136

NINA SCHRODER MAGNESS;
AGNES SCHRODER ATKINS;
LEE ALEXANDER MAGNESS,

Plaintiffs-Appellees,

versus

RUSSIAN FEDERATION; ET AL.,

Defendants,

RUSSIAN FEDERATION; RUSSIAN
MINISTRY OF CULTURE;
RUSSIAN STATE DIAMOND FUND,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas, Houston

April 24, 2001

Before JOLLY and DAVIS, Circuit Judges, and RESTANI,
Judge.[1]

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1. Judge of the U.S. Court of International Trade, sitting by designation.

GRADY JOLLY, Circuit Judge:

During the Bolshevik Revolution of 1918, the Soviet government expropriated a piano factory and mansion owned by the Magness family in St. Petersburg, Russia. In 1994, the appellees, descendants of the Magness family, believed that changes in the laws of the Russian Federation may now authorize the recovery of their property. The Magness descendants met with Russian officials in St. Petersburg in an unsuccessful attempt to regain the real estate. This suit followed and a default judgment was entered against the Russian defendants in the amount of $234 million plus interest.

In this appeal we are called upon to interpret the service of process provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a-b), which outlines the methods for serving process upon foreign entities. Specifically, we must determine whether those provisions demand strict compliance therewith, or whether either of these provisions can be satisfied by some form of substantial compliance. In keeping with the plain language of the FSIA, we conclude that Congress intended to require strict compliance with section 1608(a) as to service upon foreign states and their political subdivisions. However, we also hold that substantial compliance—that is, actual notice of the suit and the consequences thereof—can be sufficient to satisfy the requirements of section 1608(b) as to service upon an agency or instrumentality of a foreign state. In conclusion, we vacate the default judgment and remand to allow proper service on the defendants.

I

We turn first to the procedural history of this case. In July 1997, the Magness descendants filed this suit in the Southern District of Texas, seeking a TRO that would prevent a traveling exhibit of Russian Romanov family jewels, then on display in Houston, from leaving the jurisdiction. The named defendants included the Russian Federation, the Russian Ministry of Culture, the Russian

State Diamond Fund,[2] and the Cultural Foundation sponsoring the exhibition.[3] The suit alleged that the defendants had nationalized the Magness family property in 1918 and further had expropriated several antique pianos owned by the plaintiffs in the 1990s. The Russian Federation obtained United States counsel, who represented its interest at the TRO hearing. The court denied the TRO request.

After a year-long dormancy, in August 1998 the district court ordered the Magness descendants to serve the summons and complaint on the defendants, and to do so before September 1, 1998. They attempted to serve the defendants in several ways. They first served the attorneys who represented the Russian Federation at the TRO hearing. In addition, they served the Texas Secretary of State, with instructions that the Secretary forward the summons and complaint to "the Russian Federation c/o Boris Yeltsin and the Russian Ministry of Culture/Russian State Diamond Fund c/o Deputy Minister of Culture Mikhail Schvidkoy." The Magness descendants also forwarded the summons and complaint to the Director of Special Consular Affairs at the State Department, with instructions to serve all defendants through diplomatic channels.[4] Finally, the Magness descendants purported to serve process by sending the summons and complaint directly to the Russian Deputy Minister of Culture in Moscow.[5]

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2. The State Diamond Fund is an agency of the Russian Federation created to house and oversee Russia's collection of precious stones.

3. The default judgment eventually awarded against the American-Russian Cultural Cooperation Foundation was later dropped by the court, and the Foundation is not a party to this appeal.

4. While the Magness descendants recognize that service was never completed through the State Department, they allege that the defendants received service through the Texas Secretary of State and otherwise had actual notice of the suit.

5. The record shows that some persons signed for these mailed documents. However, there is no indication of who specifically signed for the documents. Nor is there any evidence of who in the Russian government may have seen the documents.

On November 13, 1998, the State Department informed the Magness descendants that it could not serve the defendants because of several procedural errors.[6] On November 19, 1998, the Magness descendants filed a motion for a default judgment. The court held a hearing on the motion the following day, during which the Magness descendants submitted evidence that they had served the defendants by the methods previously described. The court determined that the defendants had been properly served and entered a default judgment. The court approved the Magness descendants' proposed findings of facts and conclusions of law on June 8, 1999, and entered a final judgment against the defendants. *See Magness v. Russian Federation*, 54 F.Supp.2d 700 (S.D. Tex. 1999).

In October 1999, the defendants retained United States counsel in an attempt to vacate the default judgment under Rule 60. On January 12, 2000, the district court denied the motion, ruling that the Magness descendants had "substantially complied" with the service of process requirements of the FSIA and provided sufficient notice of the suit to the defendants. This appeal followed.

II

A district court's denial of a motion to vacate under Rule 60 is reviewed for abuse of discretion. *See CJC Holdings v. Wright & Lato, Inc.*, 979 F.2d 60, 63 (5th Cir. 1992). Because of the seriousness of a default judgment, "even a slight abuse [of discretion] may justify reversal." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)).

The FSIA outlines specific provisions for service of process upon foreign governments and agencies in 28 U.S.C. § 1608.[7] The

6. The State Department gave the Magness descendants' counsel advice on correcting these errors and offered a contact should they have any further questions.

7. In full, § 1608(a-b) reads (emphasis added):

(a) Service in the courts of the United States and of the States shall be made upon a *foreign state or political subdivision* of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with *any special arrangement* for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an *applicable international convention* on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, *by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court* to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, *by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington*, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

(b) Service in the courts of the United States and of the States shall be made upon *an agency or instrumentality of a foreign state*:

(1) by delivery of a copy of the summons and complaint in accordance with *any special arrangement* for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other *agent authorized by appointment or by law* to receive service of process in the United States; or in accordance with an *applicable international convention* on service of judicial documents; or

(3) *if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice*, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a *letter rogatory* or request or

(B) *by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court* to the agency or instrumentality to be served, or

(C) as directed *by order of the court* consistent with the law of the place where service is to be made.

Magness descendants acknowledge that they failed strictly to comply with the service provisions of the FSIA.[8] The provisions for service under section 1608 are hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute.[9] Regarding the Russian Federation and the Russian Ministry of Culture under section 1608(a), they must first be served in accordance with any special arrangement between the parties or in accordance with an applicable international convention. *See* 28 U.S.C. § 1608(a)(1-2). Given that there was no special arrangement or international convention governing service here, the Magness descendants are required to have attempted service on the head of the Russian Ministry of Foreign Affairs. *See* 28 U.S.C. § 1608(a)(3). Finally, if service could not be made through the Ministry of Foreign Affairs within thirty days, they could resort to service through the State Department. *See* 28 U.S.C. § 1608(a)(4).

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8. All parties agree that service upon the Russian Federation (as a foreign state) and the Russian Ministry of Culture (as a political subdivision) is dictated by § 1608(a), while service upon the Russian State Diamond Fund (as an instrumentality of Russia) is governed by § 1608(b). Under 28 U.S.C. § 1603(a), the term "political subdivision" includes all governmental units beneath the central government. An "agency or instrumentality" of a foreign state, on the other hand, is defined as any organ or political subdivision of a foreign state which is a separate legal person or entity. 28 U.S.C. § 1603(b). Whether an entity is a "separate legal person" depends upon the nature of its "core functions"—governmental vs. commercial—and whether the entity is treated as a separate legal entity under the laws of the foreign state. *See Transaero v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994); *Hyatt Corp. v. Stanton*, 945 F.Supp. 675, 683 (S.D.N.Y. 1996). Under this formulation, the Russian Ministry of Culture is governed by § 1608(a), while the Russian State Diamond Fund is a separate legal entity governed by § 1608(b).

9. The legislative history of the FSIA confirms this structure of the service provisions, in that Congress expressly provided that "[t]here is a hierarchy in the methods of service." H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), at 11.

Instead of asking the clerk of the district court to send the summons and notice of suit by return receipt mail to the head of the Russian foreign ministry under section 1608(a)(3), the Magness descendants sent their complaint to the Texas Secretary of State for forwarding to Boris Yeltsin, and sent the complaint *directly* to the Russian Deputy Minister of Culture. Thus, the FSIA was not strictly complied with as to the Russian Federation and Ministry of Culture.[10]

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10. As to the defendant Russian Federation, the Magness descendants argue that any service of process defense was waived when the Russian Federation sent counsel to appear at the TRO emergency hearing in July 1997. At the time of the TRO hearing, the Magness descendants had not yet attempted service; thus, Russia could not have been expected to raise a faulty service defense. The law establishes that waiver under the FSIA occurs "only when the sovereign/state fails to assert immunity in a responsive pleading." *MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661-62 (5th Cir. 1996).

    The cases cited by the Magness descendants fail to support sufficiently their argument that Russia's appearance at an emergency TRO hearing before any attempted service waived any faulty service defense. The Magness descendants primarily rely on *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987), for this proposition. However, the defendants in *Broadcast Music* actively participated in events surrounding the trial for months by accepting deposition notices, engaging in settlement discussions, and attending pretrial meetings. Here, Russia made only one appearance—at an emergency TRO hearing held one day after the claim was filed—and Russia's TRO counsel informed the Magness descendants that they were unable to accept service on behalf of Russia.

    Even the district court apparently did not think the Russian Federation had waived its right to proper service. After a year of inaction following the TRO denial, the court threatened to dismiss the Magness descendants' suit if they did not properly serve the defendants by September 1, 1998. The court, it appears to us, would not have ordered such service upon Russia if it believed the Federation's appearance at the TRO had waived service.

As to the Russian State Diamond Fund, section 1608(b) (applicable to instrumentalities of a foreign state) was similarly not strictly followed. A plaintiff must first attempt service in accordance with any special arrangement between the parties. *See* 28 U.S.C. § 1608(b)(1). Next, a plaintiff may serve through an authorized agent in the United States or according to an applicable international convention. *See* 28 U.S.C. § 1608(b)(2). If no such agent or convention exists, as was the case here, a plaintiff may serve papers via a letter rogatory,[11] through the clerk of the court, or as directed by the court, if these methods are "reasonably calculated to give actual notice." *See* 28 U.S.C. § 1608(b)(3). Instead of following the statute, the Magness descendants forwarded a copy of their papers to the State Department and the Texas Secretary of State for service upon the Fund. Thus, the requirements of section 1608(b) were not strictly followed as to the Russian State Diamond Fund.[12]

III

The question before this court, therefore, is whether strict compliance is required for service of process under section 1608(a), for a foreign state, and under section 1608(b), for an instrumentality of a foreign state. The Magness descendants contend that, even if their attempts at service of process upon the defendants did not strictly comply with section 1608, they substantially complied with the FSIA, and that the defendants had actual notice of the suit. They further argue that, in any event, the Russian Federation waived its right to contest service by appearing at the TRO hearing. The

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11. A letter rogatory is a formal request from a court in one country to the appropriate judicial authorities in another country that can effectuate service of process.

12. All parties acknowledge that no "special arrangement" existed between the parties in this case, and no applicable "international convention" authorizes service in any way. Therefore, § 1608(a)(1-2) and § 1608(b)(1-2) are inapplicable and not at issue in this appeal.

defendants, however, argue that the FSIA makes no provision for anything other than strict compliance with its service of process requirements, and that actual notice cannot substitute for proper service under either section 1608(a) or (b). In addition, the appellants and the United States, as amici, contend that, in any event, the Magness descendants failed to even substantially comply with section 1608(a) or (b). Because service was never effectuated, the district court had no personal jurisdiction over the defendants, they claim, and thus the default judgment should be vacated pursuant to Rule 60(b)(4).[13]

A

Section 1608(a)

We conclude that the provisions for service of process upon a foreign state or political subdivision of a foreign state outlined in section 1608(a) can only be satisfied by strict compliance. The express language of the statute requires that service "shall" be made upon a foreign state in the manner prescribed. Moreover, the committee report on the FSIA states that "section 1608(a) sets forth the *exclusive procedures* for service on a foreign state." H.R. Rep. No. 94-1487, at 24 (1976) (emphasis added).[14] This language simply does not support a finding that anything less than strict compliance will suffice under the law.

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13. The appellants alternatively argue that the default judgment should have been vacated under Rule 60(b)(3), because the judgment was secured through fraud, misrepresentation, and misconduct. They claim that the Magness descendants never informed the court that they had been instructed by the State Department that service was ineffectual, and thus they obtained the default judgment under fraudulent means.

14. Incidentally, this "exclusive procedures" language is missing in the discussion of § 1608(b) in the legislative history.

This interpretation is in accord with decisions of the Second, Seventh, and D.C. Circuits.[15] In *Gray v. Permanent Mission of People's Republic of Congo to United Nations*, 443 F.Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), the Second Circuit affirmed a district court holding that, under section 1608(a), "informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements." The court determined that actual notice given the defendant, a foreign state to be served under section 1608(a), was insufficient to meet the requirements of the FSIA. *See also Shen v. Japan Airlines*, 918 F.Supp. 686, 692 (S.D.N.Y. 1994).

The Seventh Circuit similarly required strict compliance under section 1608(a) in *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983). In that case, noting that section 1608(a) "delineates the 'exclusive procedures' for effecting service of process upon a foreign state," the court refused to excuse the plaintiff's service on the Nicaraguan Ambassador in lieu of the head of the foreign affairs ministry. *See also Magnus Elec., Inc., v. Royal Bank of Canada*, 620 F.Supp. 387, 389 (N.D.Ill. 1985), *aff'd in part, rev'd in part on other grounds*, 830 F.2d 1396 (7th Cir. 1987) (holding that "noncompliance with the [FSIA]'s literal requirements (though it certainly did provide notice) deprives this Court of personal jurisdiction.").

The District of Columbia Circuit, holding that "strict adherence to the terms of 1608(a) is required," also rejected the substantial compliance test under section 1608(a) in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert.*

15. Although the Ninth Circuit appears to have adopted a blanket "substantial compliance" test for § 1608 in *Straub v. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994), that decision dealt only with service under § 1608(b), and the court's decision in *Gerritsen v. Consulado General De Mexico*, 989 F.2d 340, 345 (9th Cir. 1993), suggests that plaintiffs must strictly comply with the service provisions on a foreign state under § 1608(a).

denied, 513 U.S. 1150, 115 S.Ct. 1101 (1995). The court rejected the claim that service upon the Bolivian Ambassador and Consul General in Washington was sufficient under section 1608(a), noting that foreign states, unlike foreign agencies or instrumentalities, may lack the "sophisticated knowledge of the United States legal system" that might otherwise authorize substantial compliance with service provisions. *Id.*

Based on these decisions, the express language of section 1608(a), and the United States' interest in ensuring that the proper officials of a foreign state are notified when a suit is instituted, we hold that plaintiffs must strictly comply with the statutory service of process provisions when suing a foreign state or political subdivision under section 1608(a).[16]

B

Section 1608(b)

The statutory language and case law concerning section 1608(b) present a different question. As such, we are convinced that substantial compliance with the provisions of service upon an agency or instrumentality of a foreign state—that is, service that gives actual notice of the suit and the consequences thereof to the proper individuals within the agency or instrumentality—is sufficient to effectuate service under section 1608(b).

Perhaps most significant to this determination is the express statement in section 1608(b)(3) that delivery under that subsection is authorized "if reasonably calculated to give actual notice." This language reflects the fact that "Congress was there concerned with

16. We leave open the possibility that, under extraordinary circumstances not present in this case, when service of process according to the express provisions of § 1608(a) is a manifest impossibility, other methods of service that fully satisfy the goals of section 1608(a) might be sufficient. However, we decline to define any such exception until those extraordinary circumstances come before this court.

substance rather than form." *Transaero*, 30 F.3d at 154. This reference to actual notice is absent from section 1608(a).

Our holding as to section 1608(b) is in accord with the Third, Sixth, Ninth, Eleventh, and D.C. Circuits, all of which have determined that substantial compliance with section 1608(b) is sufficient so long as the defendants have actual notice of the suit.[17] The Third Circuit found that service under section 1608(b) was sufficient absent strict compliance in *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981). The court noted that "[r]ather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities." *Id.* Again, the court concluded that actual notice was the determining consideration. *See also Obenchain Corp. v. Corporation Nacionale de Inversiones*, 665 F.Supp. 435, 437 (W.D.Pa. 1987), *aff'd in part, rev'd in part on other grounds*, 898 F.2d 142 (3d Cir. 1990).

The Sixth Circuit adopted a similar substantial compliance test for section 1608(b) in *Sherer v. Construcciones Aeronauticas*, 987 F.2d 1246 (6th Cir. 1993). The court observed that "the common theme running through [FSIA] cases, whether 'substantial compliance' or 'strict compliance,' is the importance of actual notice to the defendants." *Id.* at 1249. The court adopted the substantial compliance approach "under the circumstances in this case," where the defendant had answered the complaint despite the defect in service and had raised twenty-one affirmative defenses. *Id.* at 1250.

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17. We recognize that not all federal courts have found substantial compliance sufficient under § 1608(b). *See, e.g., LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D.Va. 1988) (requiring strict compliance under 1608(b)); *Lippus v. Dahlgren Mfg. Co.*, 644 F.Supp. 1473, 1479 (E.D.N.Y. 1986) (requiring that certain "exigencies" be present before excusing non-strict compliance with § 1608(b)); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F.Supp. 391, 395 (E.D.Va. 1984) (noting that "this Court is directed to strictly interpret the requirements set forth in § 1608(b).").

In *Straub v. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994), the Ninth Circuit "formally adopt[ed] a substantial compliance test for the FSIA." The court determined that, under section 1608(b), "the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance." *Id.*[18] And in *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982), the Eleventh Circuit similarly adopted the substantial compliance test under § 1608(b), finding that actual notice should override technical deficiencies in service under that section.[19]

Finally, the D.C. Circuit in *Transaero*, 30 F.3d at 154, noted that "[t]he authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the [defendant]." *Id.* at 153. In authorizing substantial compliance under section 1608(b), the court observed that foreign agencies and instrumentalities, which are "typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack." *Id.* at 154.

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18. The Fifth Circuit has expressly disagreed with *Straub*, albeit on unrelated grounds. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998).

19. The *Harris* court appeared to limit its holding by stating, "[t]hough we find service adequate here, we admonish those seeking to invoke the FSIA to follow the service provisions it contains. . . . There is no excuse for departure from the dictates of the statute." *Id.* at 1352, n.16. Since the *Harris* decision, at least one district court in the Eleventh Circuit has interpreted this language to mean that strict compliance is required absent extraordinary circumstances. *See Shell Oil Co. v. M/V Itanage*, 830 F.Supp. 1423, 1425 (M.D.Fla. 1993).

C

In sum, virtually no authority suggests that substantial compliance would suffice under section 1608(a) as to foreign governments —the Russian Federation and the Russian Minister of Culture in this case. Nevertheless, the vast majority of the case law does support a holding that substantial compliance under section 1608(b), *coupled with actual notice*, can suffice to meet the statutory service requirements for instrumentalities of a foreign state. We formally adopt such a test for section 1608(b), but decline to authorize substantial compliance as to section 1608(a). Having already determined that the Magness descendants failed strictly to comply with either section 1608(a) or (b), we now turn to ascertain whether the plaintiffs substantially complied with the provisions of section 1608(b) as to the Russian State Diamond Fund in this case.

IV

The cases authorizing substantial compliance with the service of process provisions under section 1608(b) note that it is *actual notice* by the defendant that substantiates the compliance. The Magness descendants assert that the defendants all had actual notice of the suit, while the defendants deny having such notice.

As to the Russian State Diamond Fund, the defendants contend that the mailing of process to Boris Yeltsin and the Russian State Diamond Fund "c/o Deputy Minister of Culture Mikhail Schvidkoy" was not substantial compliance with section 1608(b), which permitted service via a letter rogatory, through the clerk of the court, or as directed by the court. *See* 28 U.S.C. § 1608(b)(3). The Magness descendants, in turn, assert that they substantially complied with section 1608(b)(3)(B), which authorizes service upon an instrumentality of a foreign state by any form of mail requiring a signed receipt. They point out that they sent service papers to the Texas Secretary of State with a request that those

documents be forwarded to the "Russian Ministry of Culture/Russian State Diamond Fund." Finally, the Magness descendants contend that all defendants had actual notice of the suit, as evidenced by the Russian Federation's appearance at the TRO hearing and the confirmation received by the Texas Secretary of State showing that the return receipt for the service documents had been signed by somebody at the "Russian Ministry of Culture/Russian State Diamond Fund."

As the United States notes, there is no evidence that the Magness descendants included a "notice of suit" in the service documents that allegedly were served. The notice of suit is an integral part of the service requirements upon foreign states, and is "designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service." H.R. Rep. No. 94-1487, at 12.

Most importantly, there is no evidence to establish that the defendants had actual notice of the suit. The Magness descendants bear the burden of proving that the defendants had actual notice. *See, e.g., Straub*, 38 F.3d at 454; *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1477 (9th Cir. 1986). Under the FSIA, proving "actual notice" requires more than a mere showing that *somebody* in the foreign state knew of the claim. *See Sherer*, 987 F.2d at 1250 (finding actual notice only because defendant hired counsel and moved to dismiss the complaint).

Because the plaintiffs have not established that they provided the Russian State Diamond Fund actual notice of the suit, substantial compliance with section 1608(b) was lacking.

V

Having determined that the Magness descendants failed to perfect service under section 1608 as to any of the defendants in this case, we now consider the district court's denial of the defendants' Rule 60(b) motion.

In *Seven Elves*, 635 F.2d at 402, this court held that a district court should consider eight factors when ruling on a Rule 60(b) motion to vacate a default judgment:

> (1) that final judgments should not lightly be disturbed;
>
> (2) that the Rule 60(b) motion is not to be used as a substitute for appeal;
>
> (3) that the rule should be liberally construed in order to achieve substantial justice;
>
> (4) whether the motion was made within a reasonable time;
>
> (5) whether, if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense;
>
> (6) whether, if the judgment was rendered after a trial on the merits, the movant had a fair opportunity to present his claim or defense;
>
> (7) whether there are intervening equities that would make it inequitable to grant relief; and
>
> (8) any other factors relevant to the justice of the judgment under attack.

Analyzing these factors, we must conclude that the default judgment in favor of the Magness descendants should be vacated as to all three defendants.[20] The motion to vacate was made within

20. The defendants request that the judgment be vacated under Rule 60(b)(3) or Rule 60(b)(4). Under Rule 60(b)(3), this court has held that "a party may engage in Rule 60(b)(3) misconduct if he fails to disclose evidence he knows about and the production of such evidence was clearly called for." *Montgomery v. Hall*, 592 F.2d 278, 279 (5th Cir. 1979). The Magness descendants evidently convinced the district court that they had properly served the defendants, even though the State Department repeatedly informed them that service was incomplete. Rule 60(b)(4) authorizes a court to vacate a judgment as "void" when personal jurisdiction is lacking. Under such circumstances, this court has determined that "the district court has no discretion, the judgment is either void or it is not." *Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 313-14 (5th Cir. 1986).

a reasonable time; the motion is not being utilized as a substitute for appeal; the interest in deciding the merits of the case outweigh the interest in finality; and, the diplomatic implications of this case encourage a consideration of the claim on the merits.

The government has emphasized the weighty diplomatic considerations underlying this case, noting that the United States has fought jurisdiction in instances where foreign attorneys have attempted to serve the United States via non-authorized government employees. In its amici brief the United States suggests that it would not consider itself to have been properly served under the attempts utilized by the Magness descendants in this case.[21] In this light, and for the reasons we have explained, we conclude that the default judgment should be vacated, that the case must be remanded, and that the Magness descendants should be allowed a reasonable time to perfect service upon the defendants.

Therefore, the judgment is VACATED and the case is REMANDED for further proceedings not inconsistent with this opinion.

V A C A T E D and R E M A N D E D.

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21. That is, the delivery of a package addressed to "George W. Bush, the White House" to a random federal agency that lacks the responsibility for foreign relations would not provide adequate notice of suit to the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NINA SCHRODER MAGNESS, AGNES SCHRODER ATKINS, AND LEE ALEXANDER MAGNESS, ***Plaintiffs,***

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, RUSSIAN STATE DIAMOND FUND, AND AMERICAN-RUSSIAN CULTURAL COOPERATION FOUNDATION, ***Defendants.***

CIVIL ACTION NO. H-97-2498.

June 9, 1999.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.
Introduction

Plaintiffs Nina Schroder Magness and Agnes Schroder Atkins' father and plaintiff Lee Alexander Magness grandfather Ivan Karlovitch Schroder, owned and operated the C.M. Schroder Piano Factor business in St. Petersburg, Russia, until 1918. At that time, the business consisted of: (i) a large piano factory; (ii) several large tracts of land for curing wood located on the shipping channel in the East Industrial Section of St. Petersburg, (iii) a large shopping center on the Nevsky Prospeckt in downtown St. Petersburg; and (iv) a mansion with over 30 rooms located in downtown St. Petersburg. According to the plaintiffs, the value of the business and the family's property in 1918 was over 16,000,000.00 gold rubles or approximately $162,000,000.00.

In 1991, Russian President Boris Yeltsin signed the 1991 Investment Code prohibiting the nationalization or expropriation of foreign investments. In 1993, the Russian Constitution gave citizens the right to inherit, lease, mortgage, and sell real property. A Special Presidential Decree gave foreign citizens the right to receive title to land.

In November, 1994 the mayor of St. Petersburg, Anatoli Alexandrovitch Sobtchak, issued regulations governing the purchase of land and property by foreigners. In July, 1994 the plaintiffs traveled to St. Petersburg, Russia in order to collect, manage and operate their family properties. Plaintiff Lee Alexander Magness paid consideration to certain Russian agencies to retain title to the properties. Plaintiffs were assured by the Russian Government that the properties legally belonged to the plaintiffs and that title to the properties would reflect such ownership. Thereafter, the Russian Federation and the Ministry of Culture claimed that all the properties at issue are "national treasures" or "historical" in nature. Thus, these agencies nationalized the properties. According to the plaintiffs, all judicial records have reportedly been lost or have intentionally been misplaced.

In August, 1994 plaintiffs purchased several pianos manufactured by the piano factory now known as the Red October Piano Factory. Defendants, the Russian Ministry of Culture and the Russian Federation, would not allow the plaintiff to ship the pianos out of Russia. The pianos were confiscated and expropriated by the Ministry of Culture and the Russian Federation as national treasures.

Plaintiffs have named the following as defendants: the Russian Federation; Russian Ministry of Culture; the Russian State Diamond Fund; and the American-Russian Cultural Cooperation Foundation. On July 25, 1997 the Court conducted a hearing on plaintiffs' petition for Temporary Restraining Order. At that hearing, the Russian Federation appeared and was represented by counsel (one

of the attorneys for the Russian Federation appeared in person and one appeared via telephone conference by permission of the Court). None of the other defendants were present, despite being notified of the hearing.

Subsequently, the Court ordered the plaintiffs to serve process on the defendants and such process was effected on August 31, 1998. As none of the defendants answered the complaint, the Court conducted a default judgment hearing on November 20, 1998. None of the defendants appeared at the hearing despite the fact that they were notified of the hearing. At the default judgment hearing, the Court considered the testimony and evidence offered by the plaintiffs. Based upon the testimony and evidence from the default judgment hearing, the Court enters the following findings of fact and conclusions of law.

II.
Findings of Fact

1. Plaintiff Nina Schroder Magness is the daughter of Johann Schroder and a citizen of the United States.

2. Plaintiff Agnes Schroder Atkins is the daughter of Johann Schroder and a citizen of the United States.

3. Plaintiff Lee Alexander Magness is the son of Nina Schroder Magness and the grandson of Johann Schroder and a citizen of the United States.

4. Johann Schroder is the son of K.M. Schroder.

5. Johann Schroder was the title owner of three real estate properties located in St. Petersburg, Russia at the time such properties were confiscated and expropriated by the Russian government in 1917.

6. From 1917 to 1994 the Russian Government claimed and held ownership of the three real estate properties previously owned by Johann Schroder.

7. The three real estate properties owned by Johann Schroder at the time of expropriation in 1917 are described as:

(1) The K.M. Schroder piano factory, now known as the "Red October Factory" located at 13th Line of Vassilivski Ostrov, St. Petersburg, Russia, approximately four stories, 80,000 square meters of space;

(2) A retail shopping center, approximately 20,000 square meters, located at No. 52 on the Nevsky Prospeckt in downtown St. Petersburg, Russia;

(3) A residential property located at Petrogradskaya No. 32 in downtown St. Petersburg, Russia.

8. In 1991 Russian President Boris Yeltsin signed the 1991 Investment Code prohibiting the nationalization or expropriation of foreign investments.

9. In 1993, the Russian Constitution gave citizens the right to inherit, lease, mortgage and sell real property and a special presidential decree gave foreign citizens the right to receive title to land.

10. In 1994, the Russian Federation promulgated a property law allowing foreigners, whose descendants were title owners of real property in Russia prior to 1917, to reclaim their descendants' real property that was confiscated and expropriated in 1917 by the Russian Government.

11. In 1994 plaintiffs Nina Schroder Magness, Agnes Schroder Atkins And Lee Alexander Magness traveled to St. Petersburg, Russia to reclaim the three real estate properties owned by their descendant, Johann Schroder.

12. Plaintiffs met with officials of the Russian Federation in 1994 and established chain of title and ownership interest in the properties in question.

13. Plaintiffs Nina Schroder Magness, Agnes Schroder Atkins and Lee Alexander Magness met with officials of the Russian Federa-

tion, executed the proper papers and documents required by Russian law to reclaim the real property, paid the requested fees, and established through historic records and testimony they were the natural heirs of Johann Schroder.

14. Upon meeting all the requirements under Russian law to reclaim the three real estate properties, officials of the Russian Federation acknowledged plaintiffs Nina Schroder Magness, Agnes Schroder Atkins and Lee Alexander Magness, ownership and title to the three real properties.

15. Defendant the Russian Federation in 1994, subsequent to plaintiffs, establishing their ownership and title to the three real estate properties, has expropriated and divested the plaintiffs of their ownership and title to the three real estate properties.

16. Defendants have not paid any compensation to plaintiffs for the properties expropriated.

17. The properties expropriated by defendants were not for public use, as the properties were sold by defendant the Russian Federation to individuals for personal profit or gain.

18. The value of the piano factory, at the time of its expropriation in 1994, was $96,000,000.00 United States dollars.

19. The value of the residential home at the time of its expropriation in 1994 was $2,160,000.00 United States dollars.

20. The value of the additional properties located on the Nevsky Prospeckt, at the time of its expropriation in 1994, was $69,120,000.00 United States dollars.

21. Plaintiffs have lost rental value and revenues from the piano factory of $38,400,000.00 United States dollars from 1994 until November 20, 1998.

22. Plaintiffs have lost rental value and revenues from the residential home of $864,000.00 United States dollars from 1994 until November 20, 1998.

23. Plaintiffs have lost rental value and revenues from the retail properties located on the Nevsky Prospeckt of $27,648,000.00 United States dollars from 1994 until November 20, 1998.

24. Plaintiff Lee Alexander Magness, while in St. Petersburg, Russia in 1994, purchased two antique Schroder pianos, one built in 1910 and the other built in 1889.

25. Plaintiff Lee Alexander Magness had monies wired from the United States, via Western Union, to St. Petersburg, Russia, to purchase the two Schroder pianos while he was in Russia.

26. Plaintiff Lee Alexander Magness fulfilled all requirements of the Russian Ministry of Culture and Russian Federation to have the two antique Schroder pianos certified for shipment out of the Russian Federation to the United States.

27. Defendant the Ministry of Culture acknowledged ownership of pianos by Lee Alexander Magness.

28. The two antique Schroder pianos were confiscated and expropriated by defendants the Russian Ministry of Culture and the Russian Federation.

29. The value of each of the two antique Schroder pianos is $200,000.00 United States dollars.

30. The Russian Federation and defendants were notified of the pending suit pursuant to Foreign Sovereigns Immunity Act *28 U.S.C. § 1608.*

31. The defendants received notice of default judgment hearing held November 20, 1998.

32. None of the defendants appeared at the default judgment hearing.

33. Plaintiff Lee Alexander Magness was qualified as an expert for purposes of damages.

34. The testimony and evidence offered by the plaintiffs at the default judgment hearing was wholly uncontroverted.

35. Defendants are displaying and exhibiting within the United States territories antiquities of like kind and character as those items expropriated.

36. Defendants are charging funds for admission to the exhibits displaying antiquities of like kind and character as those items expropriated.

37. The Russian Federation and defendants have solicited and received United States citizens' funds in exchange for guided tours to Russia to view various museums, palaces, jewels, and other items through the distribution of brochures and marketing of such at these exhibits.

III.
Conclusions of Law

1. The Court finds that defendants have been properly served pursuant to the Foreign Sovereigns Immunity Act and in accordance with international law but failed to answer.

2. The Russian Federation appeared at the Temporary Restraining Order hearing on July 16, 1997 through its attorneys, Brandon Cook of Verner, Liipfert, Bernhard, McPherson & Hand of Houston, Texas and Tim Dickinson of Dickinson & Lanmayer, of Washington, D.C. Upon request and with permission of the Court, defense counsel Tim Dickinson appeared via telephone. Brandon Cook was personally present.

3. The Russian Federation is a sovereign state.

4. The Russian Ministry of Culture, Russian State Diamond Fund and American- Russian Cultural Cooperation Foundation are agencies or instrumentalities of the Russian Federation.

5. The Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund, and American-Russian Cultural Cooperation Foundation are conducting a for profit "commercial activity" as defined in the Foreign Sovereigns Immunity Act in the States of Texas, Delaware, Tennessee, California, Nevada and various other States of the United States.

6. Defendants have engaged in commercial activities by selling admission licenses to United States citizens to view the Romanov Jewels Exhibit and the Nicholas and Alexandra Exhibit.

7. Defendants have engaged in "commercial activity" through the marketing and sales of books, T-shirts, sweat shirts, jewelry, posters, videos, post cards, and other typical Russian items at the exhibit sites.

8. Defendants have received payments in United States funds through cash, checks, money orders, and credit cards related to these "commercial activities."

9. Defendants have engaged in interstate commerce, commercial activities, and international commerce by offering and selling numerous items listed above through their web site located at www.nicholasandalexandra.com.

10. Defendants have engaged in interstate commerce, commercial activities, and international commerce by accepting various United States credit cards and funds in exchange for admissions tickets to the Nicholas and Alexandra and Romanov Jewels exhibits and in exchange for various merchandise listed above. *[1]*

11. Plaintiffs have successfully proven that three exceptions under the Foreign Sovereigns Immunity Act, specifically *28 U.S.C. § 1605(a)(2)*, apply to their claims:

> a. The Russian Federation and its agencies and instrumentalities are carrying on a commercial activity in the United States; and

b. The Russian Federation and its agencies and instrumentalities are performing acts in the United States in connection with a commercial activity elsewhere (*i.e.* tourism in Russia); and

c. The Russian Federation and its agencies and instrumentalities are performing acts outside the United States, (sales of products worldwide on the Internet and international tourism) and such acts cause a direct effect in the United States.

12. The Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund, and American-Russian Cultural Cooperation Foundation have engaged in commercial activity in the United States by: (a) specific commercial transactions or acts and by (b) regular course of commercial conduct. The Russian Federation has shown patterns of using exhibits to generate sales of Russian products and by increasing tourism to its country.

13. These commercial activities engaged in by defendants are those which a private party might engage.

14. The Russian Federations' seizure of personal and real property with subsequent leasing, operation, or sale similarly constitutes commercial activity.

15. The commercial activities carried on in the United States by the Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund, and American-Russian Cultural Cooperation Foundation have substantial contact with the United States. (*i.e.* Russia's advertisement of hotels, museums, antiquities, restaurants, shops, and solicitation of United States citizens).

16. Sufficient nexus exists between plaintiffs' expropriation claims and the stream of revenue and benefits the Russian Federation is receiving through showing various antiquities and use of Plaintiffs' real property.

17. The Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund and American-Russian Cultural Cooperation Foundation's continuing receipt of profits and benefits rightfully

belonging to Plaintiffs including those derived from United States sources, are "specific acts that form the basis of this suit."

18. The Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund and American-Russian Cultural Cooperation Foundation's solicitation of United States citizens, for special tours of museums and antiquities located in Russia, as well as in the United States, and acceptance of payments for those reservations in this country, meets the material connection requirement between plaintiffs' cause of action and the act performed in the United States pursuant to *28 U.S.C. § 1605(a)(2).*

19. The Russian Federation, Russian Ministry of Culture, Russian State Diamond Fund, and American-Russian Cultural Cooperation Foundation's seizure and sale, for continuing operation and lease, of plaintiffs' property constitute acts that Defendants have performed outside the United States territory and in connection with the commercial activities of operating the properties and managing of Plaintiffs' real estate in Russia. These activities are "of a kind in which a private party might engage", and such acts cause a direct effect in the United States in that Plaintiffs were to accept delivery of their pianos in Houston, Texas, U.S.A.

20. Owners of the Schroder piano factory and commercial realty in Russia, are entitled to profits earned by such entities. Such profits would be payable at Plaintiffs place of residence, thus further satisfying the direct effect requirement of *28 U.S.C. § 1605(a)(2).*

21. Plaintiffs have satisfied the international takings exception under the Foreign Sovereigns Immunity Act *28 U.S.C. § 1605(A)(3). [2]*

22. Defendants expropriated property in violation of international law; and (1) that property and property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the Russian Federation; and (2) that property (pianos and antiquities) is owned or operated

by the Russian State Diamond Fund, the Russian Ministry of Culture, and the American-Russian Cultural Cooperation Foundation, which are all instrumentalities or agencies of the Russian Federation and such agencies and instrumentalities are engaged in commercial activity in the United States.

23. Plaintiffs were all United States citizens at the time of expropriation in 1994.

24. Plaintiffs' claims are substantial and non-frivolous and provide a sufficient basis for exercise of jurisdiction.

25. The Russian Federation took plaintiffs' property that (a) was not for public purpose in that the properties were sold, operated and/or leased for individual personal profit or gain; (b) was discriminatory in that it singled out aliens of a particular nationality (*i.e*— United States citizens); and (c) was not accompanied by provision for just compensation (*i.e.* no plaintiff received any compensation for the seizures).

26. The Russian Federation's violation of any one of the above proscriptions is a violation of international law.

27. The Russian State Diamond Fund, Ministry of Culture, and American-Russian Cultural Cooperation Foundation all meet the definition of an agency or instrumentality of the Russian Federation. They are:

(1) Separate of the Russian Federation;

(2) An organization of a foreign state or political subdivision thereof; and

(3) are not citizens of a State of the United States.

28. Plaintiffs have been damaged by the expropriation of the three real estate properties in the total amount of 234,192,000.00 United States dollars.

29. Plaintiff Lee Alexander Magness has been damaged by the expropriation of the two antique Schroder pianos in the total amount of $400,000.00.

SIGNED at Houston, Texas on this 9 day of June, 1999.

/s/ David Hittner

DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NINA SCHRODER MAGNESS, et al., Plaintiffs,

v.

RUSSIAN FEDERATION, et al., Defendants.

CIVIL ACTION NO.97-2498

Jan. 12, 2000.

ORDER

Pending before the Court is the Motion to Vacate Default Judgment (Document # 41) filed by defendants the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund. Having considered the motion, submissions, and applicable law the Court determines that the motion to vacate should be denied.

On July 24, 1997, Plaintiffs filed their original complaint against the defendants in this action and against the American-Russian Cultural Cooperation Foundation The American-Russian Cultural Cooperation Foundation has been dismissed as a defendant in this case by agreement of the parties. alleging that the Russian government had appropriated certain property owned by the plaintiffs in the Russian Federation without paying compensation. On July 25, 1997, the Court heard and denied the plaintiffs' request for a temporary restraining order, which would have precluded the Romanov jewels from leaving the United States.[1]

On August 13, 1998 the Court ordered the plaintiffs to serve summons and the complaint on the defendants before September 1, 1998. The plaintiffs served each of the defendants as follows:

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[1] The American-Russian Cultural Cooperation Foundation has been dismissed as a defendant in this case by agreement of the parties.

The Russian Federation: On August 31, 1998, plaintiffs forwarded a copy of the Summons and the Original Complaint, via Federal Express, to the Secretary of State of Texas to be served on Boris Yeltsin, President of the Russian Federation, at the Kremlin, in Moscow and on the Deputy Minister of Culture, through the Secretary of State of Texas;

Russian Ministry of Culture: On August 31, 1998, plaintiffs forwarded a copy of the Summons and the Original Complaint, via Federal Express, to the Secretary of State of Texas to be served on the Russian Ministry of Culture;

Russian State Diamond Fund: On August 31, 1998, plaintiffs forwarded a copy of the Summons and Original Complaint, via Federal Express, to the Director of Special Consular Affairs at the United States Department of State in Washington, D.C.

In addition, the plaintiffs also forwarded a copy of the Summons and Original Complaint via Federal Express to James Symington, Chairman of the American-Russian Cultural Cooperation Foundation and to Edward A. Betancourt, in his capacity as Director of the Office of Policy Review and Inter-Agency Liaison in the Directorate Overseas Citizens Services of the Bureau of Consulate Affairs, United States Department of State. Finally, the plaintiffs provided copies of the Summons and Original Complaint to Tim Dickerson and Brendan Cook, attorneys for the defendants.

The Foreign Sovereign Immunities Act, *28 U.S.C. § 1608*, provides the procedure for service of process on a foreign state or its political subdivisions, agencies, or instrumentalities.

Section 1608(a) provides for the proper procedure for service on a foreign state or political subdivision of a foreign state, *i.e.* the Russian Federation and the Russian Ministry of Culture, as follows:

> (1) delivery of the summons and complaint in accordance with any special arrangement that may exist;

(2) delivery of the summons and complaint in accordance with an applicable convention on service of judicial documents;

(3) absent such arrangement or convention, transmittal of a copy of the summons and complaint and a notice of suit, together with translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under the third scenario, by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by a form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Section 1608(b) provides the proper procedure for service on a foreign agency or instrumentality, *i.e.* the Russian State Diamond Fund, as follows:

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) a copy of the summons and complaint may be delivered in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency of instrumentality to be served, or

(C) as directed by order of the court consistent with the place where service is to be made.

The defendants argue that as the plaintiffs have failed to properly comply with the procedural requirements of the Foreign Sovereign Immunities Act, the service on the defendants was defective, rendering the entry of the default judgment in this case void. Specifically, defendants argue that there were no "special arrangements" between plaintiffs and the defendants and no applicable international treaty or convention. Thus, neither *sections 1608(a)(1)-(2)* nor *section 1608(b)(1)-(2)* apply.

According to the defendants, the plaintiffs failed to comply with the requirements of the remaining *sections, § 1608(a)(3) and (a)(4).* First, the plaintiffs sent a copy of the Original Complaint and Summons, through the Secretary of State of Texas, to President Yeltsin and the Deputy Minister of Culture. According to the defendants, service by the Secretary of State of Texas on President Yeltsin and the Deputy Minister of Culture, is not service on the Russian Ministry of Foreign Affairs as required by *§ 1608(a)(3).*

Defendants argue that plaintiffs alternatively failed to meet the requirements of *§ 1608(a)(4).* Plaintiffs were informed by the State Department that service under *§ 1608(a)(4)* would not be effected because the plaintiffs had failed to: (1) exhaust the method of service under *§ 1608(a)(3);* (2) make reference in the Summons to the 60 days provided in *28 U.S.C. § 1608(d)* within which time the

Original Complaint must be answered after service is effected; and (3) forward a Notice of Suit prepared in accordance with *22 C.F.R. § 93.2*. Plaintiffs were further informed that "[w]hen these procedural discrepancies have been resolved, the Department of State will forward the request to the U.S. Embassy in Moscow for transmittal of the summons, complaint, and notice of suit to the Ministry of Foreign Affairs."

Defendants also argue that the plaintiffs have not served the Russian State Diamond Fund pursuant to the service requirements of *28 U.S.C. § 1608(b)*. The plaintiffs were required to serve the Russian State Diamond Fund pursuant to *§ 1608(b)(3)(A)*, by forwarding the Summons and Original Complaint through a "letter rogatory or request." Plaintiffs also failed to request the clerk of the Court to dispatch, "by any form of mail requiring a signed receipt," copies of the charging documents to the Russian State Diamond Fund. Nor has the Court ordered service on the Russian State Diamond Fund "consistent with the law of Russia," pursuant to *28 U.S.C. § 1608(b)(3)(B) and (C)*. According to the defendants, the plaintiffs' failure to strictly comply with the service requirements under *§ 1608* altogether nullifies this Court's entry of default judgment.

In response, the plaintiffs acknowledge that they have not technically complied with the requirements for service of process on the defendants pursuant to *§§ 1608(a) and (b)*. However, the plaintiffs contend that because the defendants do not dispute that actual notice was received, precise compliance with the statutory requirements of service under the Foreign Sovereign Immunities Act is not required. Rather, provided the plaintiffs "substantially complied" with the Act's requirements, service is satisfied and the default judgment should not be vacated.

Both sides have cited extensive case law to support their respective positions. For example, plaintiffs rely on *Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246 (6th Cir.), cert.*

denied, 510 U.S. 818, 114 S.Ct. 72, 126 L.Ed.2d 41 (1993). In *Sherer*, the defendant, a Spanish corporation owned primarily by the Spanish government, was served pursuant to *28 U.S.C. § 1608(b)(3).* However, the plaintiff did not send a Spanish translation as required by the Act. The Court found that a technical defect in service "should not override the fact that the defendant received actual notice." *Id. at 1249. See also Velidor v. L/P/G Benghazi, 653 F.2d 812, 821 (3d Cir.1981)* ("Rather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice."), *cert. dismissed, 455 U.S. 929, 102 S.Ct. 1297, 71 L.Ed.2d 474 (1982).*

The defendants rely on cases which have found that strict compliance with the Foreign Sovereign Immunities Act service requirements is directed by the statute. For example, in *Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C.Cir.1994), cert. denied, 513 U.S. 1150, 115 S.Ct. 1101, 130 L.Ed.2d 1068 (1995)* the court held that "strict adherence to the terms of 1608(a) is required." The plaintiff in *Transaero* had obtained a default judgment against the Bolivian Air Force. The central question in the case was whether the defendant was an agent or instrumentality of a foreign state or a foreign state or political subdivision. The plaintiff had served the defendant pursuant to the requirements for an agent or instrumentality pursuant to 1608(b). The court found that because the defendant was a foreign state or political subdivision, the technical requirements of 1608(a) should have been satisfied and actual notice provided via 1608(b) was insufficient.

The authorities offered by the plaintiffs and defendants are from circuits other than the Fifth Circuit. While these authorities are persuasive, none are binding on this Court. Rather, it appears that this is a case of first impression in this Circuit. Accordingly, this Court must determine whether substantial compliance and ac-

tual notice or whether strict compliance with the Foreign Sovereign Immunities Act apply in this case.

Having considered the authorities and arguments offered by the parties in this case, the Court determines that the defendants received actual notice of the proceedings in this Court, which service substantially complied with the Foreign Sovereign Immunities Act. Despite receiving notice, the defendants elected not to respond to these proceedings until after this Court had entered a default judgment. For the defendants to now insist on technical compliance with the Act would not serve the interests of justice or judicial economy. Accordingly, based on the foregoing, the Court hereby.

ORDERS that the Motion to Vacate Default Judgment (Document # 41) is DENIED.

SIGNED at Houston, Texas on this *12* day of January 2000.

/s/ David Hittner

DAVID HITTNER
United States District Judge

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT ALABAMA,
SOUTHERN DIVISION.**

**NINA SCHROEDER MAGNESS, AGNES SCHROEDER ATKINS, AND LEE ALEXANDER MAGNESS,
Plaintiffs,**

v.

**RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE AND RUSSIAN STATE DIAMOND FUND.
Defendants.**

Misc. Action No. 99-0007-CB-M.

Jan. 28, 2000.

ORDER

BUTLER, Chief Judge.

This matter is before the Court on plaintiffs' petition for writ of execution in aid of a judgment entered in another district and registered here. For reasons set forth below, the Court finds that the property upon which plaintiffs seek to execute is immune from execution.

Procedural Background

On June 9, 1999, Judge David Hittner of the United States District Court for the Southern District of Texas entered a final judgment in Civil Action Number H-97-2498 in favor of the above-named plaintiffs and against defendants Russian Federation, Russian Ministry of Culture and Russian State Diamond Fund.[1] Judgment in the amount of $234,192,000 was entered in favor of all

[1] Judgment was also entered against a fourth defendant, American-Russian Cultural Cooperation Foundation, but that defendant was later dismissed by agreement.

plaintiffs, and plaintiff Lee Alexander Magness received an additional award of $400,000. Plaintiffs are citizens of the United States. Defendant Russian Federation is a foreign sovereign. Defendants Russian Ministry of Culture and Russian State Diamond Fund are agents or instrumentalities of the Russian Federation.

Because none of the defendants answered or appeared in the underlying action, defendants were found to be in default, and final judgment was entered after a default judgment hearing.[2] The defendants subsequently moved to vacate or set aside the default judgment, which was denied by order dated January 12, 2000.

On January 26, 2000, plaintiffs filed a petition for writ of execution[3] in this Court seeking to execute against assets of the defendants which are part of the Nicholas and Alexandra Exhibit (''the Exhibit'') temporarily located Mobile, Alabama. Among the items the plaintiffs are attempting to seize are the Golden Coronation Carriage, circa 1793, the Grand Piano of Empress Alexandra Feodorova, circa 1898, Miniature Copy of Imperial Regalia by Faberge Jewels, circa 1899-1900 and certain artworks.

On January 27, 2000, the Court held a telephone conference with counsel for plaintiffs and counsel for defendants. Plaintiffs informed the Court that the exhibit is scheduled to leave Mobile on Sunday, January 30, 2000. Therefore, the Court set an expedited briefing schedule, *1359 giving the parties approximately twenty-four hours to submit briefs. On the morning of January 28, 2000,

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[2] Judge Hittner found that the defendants were not immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § § 1602 et seq., and that the defendants had expropriated property belonging to these plaintiffs in violation of international law. Magness v. Russian Federation, 54 F.Supp.2d 700 (S.D.Tex.1999).

[3] On July 30, 1999, the underlying judgment was registered in this District.

the United States of America, intervened in these proceedings pursuant to 22 U.S.C. § 2459(b). The United States opposes the petition on the ground that "the cultural artifacts that petitioners seek to attach are immune from seizure under federal law." (Doc. 4, Opposition Filed by United States, p. 2) Both plaintiffs and defendants subsequently filed briefs setting forth their respective positions in support of and in opposition to the issuance of the writ. In addition, at 11:41 a.m. today plaintiffs filed a motion for temporary restraining order seeking an order prohibiting removal of the exhibit pending a hearing on an application for preliminary injunction or upon determination of the plaintiff's petition for writ of execution, whichever occurs first.

Legal Discussion

[1] Rule 65(b) states that "a temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition . . ." Since there is no dispute that the Exhibit is leaving this jurisdiction within 48 hours (on a Sunday), and although the application reflects faxed notice to all parties, the application for a TRO is the functional equivalent of a one without notice. For the Court to issue such an extraordinary writ under the circumstances, there must be some initial showing of the irreparable injury, loss or damage. That is not the case here, as neither the application for TRO nor the affidavit in support thereof suggests that the plaintiffs will be unable to recover on their judgment in some other fashion, rather than by seizing the Exhibit.

[2][3] The property of a foreign state is generally immune from attachment or execution pursuant to the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1609. Plaintiffs rely on certain statutory exceptions that apply when property of a foreign state is used for a

commercial activity in the United States. The Court need not determine the applicability of those exceptions, however, because seizure is not permitted in this case due to another law which specifically forbids the use of judicial process to seize another country's works of art or objects of cultural significance:

> Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States . . . may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

22 U.S.C. § 2459.

On June 4, 1998, the General Counsel of the United States Information Agency, acting as the President's designee,[4] published notice determining that "the objects *1360 to be included in the exhibit, 'Nicholas and Alexandra: The Last Imperial Family of Tsarist Russia,' . . . imported from abroad for the temporary exhibition without profit within the United States, are of cultural signifi-

[4] The President delegated this authority to the Director of the USIA by Executive Order 12047, 43 Fed. Reg. 13359 (1978), as amended by Executive Order 12388, 47 Fed. Reg. 46245 (1982).

cance." 63 Fed. Regis 30567 (1998).[5] In addition, the president's designee found that "[t]hese objects are imported pursuant to a loan agreement with a foreign lender" and that "their exhibition is in the national interest." Id.

Plaintiffs argue that Judge Hittner has made findings that defeat the immunity provided for in § 2459(a). Specifically, plaintiffs contend that Judge Hittner found the Exhibit to be "for profit". However, the availability of this Exhibit's assets for execution was not before Judge Hitter. His findings related solely to the issue of his jurisdiction and did not specifically find that the USIA's notice and determination that the Exhibit was without profit was unfounded at the time it was issued. In view of the fact that an agency's determination is entitled to deference, see McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir.1982), this Court will not attempt to go behind that determination and, thus, put in jeopardy the Exhibition which was originally brought into this country in reliance on such a determination. In effect, the plaintiffs are asking this Court to ex post facto overrule the June 4th, 1998, Notice of Determination.

Therefore, the items upon which plaintiffs seek to execute are immune from execution pursuant to 22 U.S.C. § 2459. Accordingly, it is ORDERED the petition for writ of execution and the application for temporary restraining order be and hereby are DENIED.

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[5] The list of items provided to the Court by the USIA pursuant to procedures outlined in the Federal Register notice includes the items that are the subject of plaintiffs' petition writ of execution.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a ''notice of suit'' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, apolitical subdivision thereof, or an agency

or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Supreme Court, U.S.
FILED
AUG 22 2001

Nos. 01-139 and 01-168

IN THE

Supreme Court of the United States

LEE ALEXANDER MAGNESS,

Petitioner,

-and-

NINA SCHRODER MAGNESS and
AGNES SCHRODER ATKINS,

Petitioners,

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, and RUSSIAN STATE DIAMOND FUND,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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The United States Court of Appeals for the Fifth Circuit held in this case[1] that service on foreign states and their political subdivisions has to comply strictly with the requirements of the Foreign Sovereign Immunities Act,[2] specifically 28 U.S.C. § 1608(a).[3] The appeals court also held that service on those states' agencies and instrumentalities – under 28 U.S.C. § 1608(b) – may, in limited circumstances not present in this case, substantially comply with the FSIA.[4] The court then vacated the decision of the United States District Court for the Southern District of Texas which had denied a motion to vacate a $234 million default judgment.[5] The appeals court found that the district court had erred in denying the motion because plaintiffs (petitioners here) had utterly failed in all respects to serve process as required by the FSIA.[6] Instead of dismissing the case, however, the appeals court remanded it to the district court with instructions that the court still allow "a reasonable time to perfect service."[7] Petitioners were given yet another opportunity to effect proper service and, thereafter, proceed with litigating their case. There is nothing legally remarkable about the appeals court's decision, and there are no compelling reasons to bring the matter now before this Court. Therefore, respondents the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund

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1. *Magness v. Russian Federation*, 247 F.3d 609, 611 (5th Cir. 2001) (included in the appendices (cited hereinafter jointly as "A-#") (at A-1 to A-17) to the petitions for writ of certiorari); A-2.

2. Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611.

3. Section 1608 is included at A-42 to A-44. Subsection (a) establishes the requirements for service of process on foreign states and their political subdivisions.

4. 247 F.3d at 616; A-11.

5. *Id.* at 619; A-17.

6. *Id.* at 619; A-16.

7. *Id.* at 619; A-17.

respectfully request that the Court deny the petitions for writ of certiorari.[8]

STATEMENT OF THE CASE[9]

Although petitioners have never clearly identified or defined the terms of the Russian law which they allege generated this dispute, they have throughout asserted[10] without documentation that a law was enacted in Russia in 1994 entitling them, as descendants of Russians whose property was expropriated during the Bolshevik Revolution, to buy or reclaim their ancestors' expropriated property.[11] Petitioners assert that they traveled to Russia and established that they were the rightful owners of approximately $234 million worth of real estate and other properties.[12] Petitioners have further asserted without documentation that the Russian Federation refused to return this property to them and, thereby, expropriated it again.[13]

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8. Lee Alexander Magness filed his petition *pro se* (no. 01-139); Nina Schroder Magness and Agnes Schroder Atkins filed, through counsel, a separate petition (no. 01-168). Both petitions are treated jointly in this brief in opposition.

9. Petitioners failed to provide a "statement of the case setting out the facts material to consideration of the questions presented," as required by Sup. Ct. R. 14(1)(g). In its absence, respondents supply the following statement. Citations are to the record before the appeals court.

10. R. at 11; 11/20/98 Default Hearing Tr. at 14-15, 21-22.

11. Without regard to the requirements of Fed. R. Civ. P. 44(a)(2) or 44.1 (which govern the authentication and determination of foreign law), petitioners provided the district court an untranslated Executive Order by the Mayor of St. Petersburg governing registration of enterprises with foreign investments. (*See* 11/6/98 Show Cause Hearing Tr., Exh. 28.) This law, by its terms, has no relevance to the alleged national policy for repatriation of property or goods seized by the Bolsheviks.

12. R. at 11, Default Hearing 15-17, 27-32.

13. R. at 9-11; 11/20/98 Default Hearing Tr. at 12, 17-18, 20-21.

In 1997, the American-Russian Cultural Cooperation Foundation sponsored a touring exhibition of art and cultural objects from the Russian Federation known as the "Jewels of the Romanovs/Treasures of Russia."[14] This exhibit traveled to the Museum of Fine Arts in Houston, Texas.[15] On July 24, 1997, a few days before the exhibit was scheduled to depart, petitioners filed a Complaint against four defendants – the Russian Federation, the Russian Ministry of Culture, the Russian State Diamond Fund,[16] and the Foundation sponsoring the exhibit – contending that the Russian government had expropriated their property without paying just compensation.[17] Among other relief, petitioners sought a temporary restraining order ("TRO") barring the removal of the Romanov jewels from the court's jurisdiction because the jewels could satisfy any judgment petitioners might secure.[18]

On July 25, 1997, one day after the Complaint was filed, the court held a hearing to address petitioners' motion for a TRO.[19] The Russian Federation learned of petitioners' attempts to seize the Romanov jewels from the Foundation, and secured counsel to prevent petitioners from disrupting the exhibit.[20] The court denied their motion.[21]

One year later, petitioners had yet to attempt to serve any of the defendants.[22] As a result, the district court ordered

14. R. at 10, 162.

15. *Id.*

16. The State Diamond Fund is an agency or instrumentality of the Russian Federation created by Czar Peter I in 1719 to house Russia's collection of jewels and precious stones.

17. R. at 1-15.

18. R. at 5-8.

19. R. at 16-17.

20. R. 346-47; 7/25/97 TRO Hearing Tr. at 1-39.

21. R. at 18-19.

22. R. at 24.

petitioners to effect service before September 1, 1998, and to provide proof of such service to the court.[23] The Rule of Civil Procedure governing service (Rule 4) was cited in the court's order.[24]

Despite the explicit requirements of § 1608, on August 31, 1998 (the very last possible day on which they could effect service as required by the court), petitioners purported to effect service on the Russian Federation in their own way by forwarding a copy of the Summons and Complaint to: (1) the Secretary of State of Texas with instructions to serve the Russian Federation, c/o Boris Yeltsin;[25] (2) defense counsel;[26] and (3) the Director of Special Consular Affairs at the U.S. State Department, with instructions to serve the Russian Federation.[27]

Also on August 31, 1998, petitioners purported to serve the Russian Ministry of Culture, the State Diamond Fund, and the Foundation by forwarding a copy of the Summons and Complaint to: (1) the Secretary of State of Texas with instructions to serve the Ministry of Culture and the State Diamond Fund;[28] (2) the Director of Special Consular Affairs at the U.S. State Department with instructions to serve the Ministry of Culture, the State Diamond Fund, and the Foundation;[29] and (3) the Foundation's Chairman.[30]

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23. *Id.*

24. *Id.* (Fed. R. Civ. P. 4 refers to the precise section of the FSIA (28 U.S.C. § 1608) governing "service upon a foreign state or a political subdivision, agency, or instrumentality thereof." *See* Fed. R. Civ. P. 4(j)(1).)

25. R. at 27, 32-33.

26. R. at 30, 35-36.

27. R. at 28, 31.

28. R. at 27, 32-33.

29. R. at 28, 31.

30. R. at 29, 34.

Petitioners' counsel was repeatedly advised of the serious deficiencies in the methodology petitioners had pursued. On September 1, 1998, immediately after attempted service, the once counsel for the Russian Federation informed petitioners' counsel he could not accept service of process for the Russian Federation because he no longer represented the Russian Federation or any other defendant as he had only been retained to represent the Russian Federation at the TRO hearing.[31] Indeed, no defense counsel ever entered an appearance in the case.[32] On November 13, 1998, the State Department informed petitioners' counsel that it could not undertake service because of numerous procedural irregularities with petitioners' submission.[33] Petitioners ignored these warnings and continued to serve the State Department and the no-longer counsel for the Russian Federation (both of whom repeatedly informed petitioners' counsel that service could not be effected through them).[34] Service of the Complaint, as the appeals court eventually found, was never perfected.

On November 19, 1998, petitioners filed their Motion for Default Judgment.[35] The very next day, the court held a hearing on the motion.[36] Defendants were not notified and, therefore, did not appear. Petitioners submitted at the hearing copies of Federal Express receipts, facsimile confirmation sheets, and cover letters showing the above described methods of service.[37] However, neither petitioners nor their counsel informed the court they had been instructed by the State Department and former Russian Federation counsel that service was ineffective, nor

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31. R. at 346.

32. *See* District Court Docket Sheet.

33. R. at 469.

34. R. at 317, 346, 488-491, 479-481, 473, 471.

35. R. at 50-57.

36. R. at 60.

37. 11/20/98 Default Hearing Tr. at 5-6, Ex. 1-6.

did petitioners' counsel introduce the letters written by the State Department stating service was ineffective.[38] Relying on petitioners' uncontradicted representations, the court found that defendants had been served and entered a default judgment.[39] On February 26, 1999, petitioners submitted proposed Findings of Fact and Conclusions of Law.[40] The court approved them on June 8, 1999.[41] That day the court also entered final judgment against all defendants for approximately $234 million plus interest.[42]

On June 15, 1999, the State Department received a request from petitioners' counsel to serve the final judgment on defendants.[43] On June 22, 1999, the State Department again wrote petitioners' counsel advising him that it could not comply with his request to forward the judgment because petitioners had not properly served the Summons, Complaint, and a Notice of Suit through diplomatic channels.[44] Service of the final judgment was never perfected.

On June 23, 1999, the Foundation filed a motion to vacate the final judgment against it.[45] The State Department filed an affidavit notifying the district court that the State Department did not serve any of the defendants with the Complaint or the Default Judgment as petitioners' counsel had requested, and explained the specific procedural irregularities with petitioners' attempted service.[46] On August 18, 1999, the court granted the

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38. *Id.*

39. R. at 61.

40. R. at 69-80.

41. R. at 84-97; A-18 to A-29.

42. R. at 98-99.

43. R. at 301, 317.

44. R. at 307-09, 317.

45. R. at 177-90.

46. R. at 218-321.

Foundation's motion.[47] Subsequently, petitioners agreed to dismiss with prejudice their claims against the Foundation.[48]

On or about August 26, 1999, Yuri V. Ushakov, Russian Federation Ambassador to the United States, who had been appointed earlier in 1999, first learned of petitioners' case and the entry of default judgment.[49] Thereafter, undersigned counsel was retained to attempt to vacate the default judgment against the remaining defendants (respondents here), the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund.[50]

On October 14, 1999, respondents filed with the district court a motion to vacate the default judgment under Fed. R. Civ. P. 60 arguing that the default judgment was void because the district court lacked personal jurisdiction in the absence of proper service of process under the FSIA.[51] On January 12, 2000, the district court denied[52] the motion concluding that while petitioners did not strictly comply with the FSIA, their attempted service was sufficient because it provided respondents notice and, thus, amounted to substantial compliance.[53]

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47. R. at 333-336.

48. R. at 337-338.

49. R. at 515-516.

50. R. at 515.

51. R. at 340-42, 518-532.

52. R. at 714-721; A-30 to A-36.

53. After the motion to vacate was denied, petitioners attempted to execute on the judgment by seizing property which was part of the "Nicholas and Alexandra" exhibit located at the time at the Mobile Alabama Civic Center. *See Magness v. Russian Federation*, 84 F. Supp. 2d 1357 (S.D. Ala. 2000), *amended by*, 2000 U.S. Dist. LEXIS 1278 (S.D. Ala. Feb. 7, 2000) (included at A-37 to A-41). Respondents successfully defeated this attempt. *Id.* Thereafter, respondents filed a motion to stay execution of the judgment pending appeal. (R. at 728-777.) The motion was granted on April 28, 2000. *See* District Court Docket Sheet.

On February 16, 2000, the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund filed their notice of appeal with the Fifth Circuit Court of Appeals.[54] Thereafter, the United States Government appeared as *amicus curiae* in their support.[55] Oral argument was held on December 4, 2000.[56] On April 24, 2001, the appeals court vacated and remanded the case to the district court.[57]

THE APPEALS COURT'S DECISION

The United States Court of Appeals for the Fifth Circuit arrived at its decision unanimously.[58] The court carefully considered and addressed each and every argument presented, and rendered a fair and just decision under the facts and applicable law. The court gave petitioners yet another opportunity to effect service. Considering the circumstances, the court was more than generous to petitioners.[59]

Methodically, the court reviewed the express language of § 1608, and considered the available legislative history of the FSIA and the relevant caselaw. The court concluded correctly

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54. R. at 724-725.

55. *See* Brief for the United States as *Amicus Curiae* Supporting Appellants.

56. *See* Appeals Court Docket Sheet.

57. *Magness*, 247 F.3d at 609; A-17.

58. The panel consisted of Circuit Judges E. Grady Jolly and W. Eugene Davis, and U.S. Court of International Trade Judge Jane A. Restani who was sitting by designation.

59. The circumstances included petitioners' willful failure to disclose to the district court, prior to the court's entry of default judgment, that the State Department had advised them their attempts at service were ineffective. Petitioners' failure to disclose this vital information, respondents maintained before the district and appeals courts, amounted to fraud, misrepresentation, and misconduct also necessitating vacation of the judgment under Fed. R. Civ. P. 60(b)(3).

that the provisions for service under section 1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute."[60] Thus, for service on the Russian Federation and the Russian Ministry of Culture, service should have first been done "in accordance with any special arrangement" between the parties.[61] Absent that (as here), the statute requires service "in accordance with an applicable international convention."[62] "Given that there was no special arrangement or international convention governing service here," the appeals court indicated that petitioners were "required to have attempted service on the head of the Russian Ministry of Foreign Affairs" in accordance with FSIA § 1608(a)(3).[63] Only if and when that proved impossible were petitioners allowed to seek State Department assistance.[64]

But, as the appeals court recognized, petitioners did not do this. Here, "[i]nstead of asking the clerk of the district court to send the summons and notice of suit by return receipt mail to the head of the Russian foreign ministry under section 1608(a)(3)," petitioners "sent their complaint to the Texas Secretary of State for forwarding to Boris Yeltsin [then Russia's President], and sent the complaint *directly* to the Russian Deputy Minister of Culture."[65] This, the court concluded, did not comply in any way with the service requirements of the FSIA.[66]

On the other hand, service under § 1608(b) for the Russian State Diamond Fund must also be done in hierarchical order. "A plaintiff must first attempt service in accordance with any

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60. *Magness*, 247 F.3d at 613; A-6.

61. 28 U.S.C. § 1608(a)(1).

62. *Id.* at § 1608(a)(2).

63. *Magness*, 247 F.3d at 613; A-6.

64. *See* 28 U.S.C. § 1608(a)(4).

65. *Magness*, 247 F.3d at 613; A-7.

66. *Id.*

special arrangement between the parties."[67] If none exists, and here there was none, petitioners had to consider service "through an authorized agent in the United States or according to an applicable international convention."[68] As there was none of either here, petitioners should have served through a letter rogatory, the court's clerk, or as otherwise directed by the court.[69]

But again, this is not what petitioners did. "[I]nstead of following the statute," petitioners forwarded a copy of their papers to the State Department and the Texas Secretary of State for service upon the [Russian State Diamond] Fund."[70] This, the court similarly concluded, did not comply in any way with the service requirements of the FSIA.[71]

The question then became for the court whether anything could excuse anything short of strict compliance with the law's requirements. The court held that "service that gives actual notice of the suit and the consequences thereof to the proper individuals within the agency or instrumentality" could provide such an excuse under FSIA § 1608(b).[72] However, nothing short of strict compliance would do for service on a foreign state or its political subdivisions.[73]

Turning then to the question whether petitioners substantially complied with the provisions of § 1608(b) as to the Russian State Diamond Fund, the court concluded that they had not for two reasons.[74] First, there was no evidence

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67. *Magness*, 247 F.3d at 614; A-8; 28 U.S.C. § 1608(b)(1).

68. *Magness*, 247 F.3d at 614; A-8; 28 U.S.C. § 1608(b)(2).

69. 28 U.S.C. § 1608(b)(3).

70. *Magness*, 247 F.3d at 614; A-8.

71. *Id.*

72. *Id.* at 616; A-11.

73. *Id.* at 616; A-11.

74. *Id.*

whatsoever that petitioners included a Notice of Suit in the service documents they allegedly served. As the appeals court explained: "The notice of suit is an integral part of the service requirements upon foreign states, and is 'designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.' "[75] Secondly, and more "importantly, there is no evidence to establish that the defendants had actual notice of the suit."[76] Here, petitioners bore the burden of proving that respondents had actual notice.[77] The court concluded that "[b]ecause the plaintiffs have not established that they provided the Russian State Diamond Fund actual notice of the suit, substantial compliance with section 1608(b) was lacking."[78]

Having determined that petitioners had failed to perfect service under § 1608, the court then considered the district court's denial of respondents' motion to vacate the default judgment.[79] Applying the Fifth Circuit's previously identified standards applicable to consideration of Fed. R. Civ. P. 60(b) motions,[80] the court held that the district court had indeed committed reversible error. The appeals court then vacated the district court's judgment, and remanded the case for further proceedings not inconsistent with its opinion.[81]

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75. *Id.* at 618, *quoting*, H.R. Rep. No. 94-1487, at 12 (1976); A-15.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

81. *Magness*, 247 F.3d at 619; A-17.

REASONS FOR DENYING THE WRIT

The Court should deny the petitions for writ of certiorari for the following reasons: (A) petitioners' questions were not presented below and/or are unsupported by the record; (B) this case does not present any genuine and substantial questions of constitutional or federal law; and (C) there is no conflict among the courts of appeals requiring resolution by this Court.

A. Petitioners' Questions Were Not Presented Below and/or Are Unsupported by the Record.

The petitions for writ of certiorari present a total of four questions which were not presented to the courts below and/or are wholly unsupported by the record. As such, the Court should deny them.

Petitioner Lee Alexander Magness would have this Court decide two questions. His first is: "In attempting to serve a corrupt foreign sovereign, does 'strict compliance' with the service of process requirements of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608[,] deny U.S. citizens access to the U.S. judicial system and due process."[82] This is the first time this question is being presented in this case. Leaving aside the totally unsupportable, unwarranted, and purposefully offensive nature of the question, the fact is that petitioners nowhere below attempted to make a record that would have supported such a finding and that any such condition should have excused their compliance with the requirements of the FSIA. Neither have petitioners ever alleged or established that, by requiring strict compliance with the FSIA requirements for service of process on foreign states and their political subdivisions, petitioners are somehow being denied access to the courts or due process.

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82. Petition no. 01-139, at i.

Petitioner Lee Alexander Magness's second question was also never presented below and lacks any support in the record: "Whether the Executive Branch, State Department and Department of Justice[,] have [sic] the right to make judicial [sic] determinations regarding sovereign immunity and service of process."[83] Taking first the issue of sovereign immunity, there has been no determination (judicial or otherwise) as to sovereign immunity because sovereign immunity is a matter with which the district court has not yet even been presented because of petitioners' own failure to effect proper service of process. Only after proper service will respondents have to file a responsive pleading at which time the issue of sovereign immunity will be briefed and, ultimately, decided. As to service of process, that has in fact remained throughout this litigation a matter for "judicial determination" and is the very crux of the issues which have been presented to the courts in this case. The role the State Department has played is the one established by the FSIA itself in § 1608(a)(4) requiring plaintiffs, if they cannot effect service of process through the other statutorily-specified means, to do so through the State Department. The Justice Department's role, on the other hand, was only as *amicus* to the Fifth Circuit Court of Appeals.

In addition to these questions, petitioners Nina Schroder Magness and Agnes Schroder Atkins present the Court with two questions of their own: (1) "Whether the Magness Plaintiffs, pursuant to the service provisions of the Foreign Sovereign Immunities Act, properly perfected service of process upon the Russian Defendants, where the Defendants received actual notice of the proceedings, and where Plaintiffs substantially, not strictly, complied with the service provisions of the Act;" and (2) "[w]hether a general appearance by a defendant at a TRO hearing, where actual knowledge of the suit is received, waives any defect in service subsequently perfected."[84]

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83. *Id.*

84. Petition no. 01-168, at i.

While these questions have been raised previously in some form, they both explicitly assume that respondents had in fact received actual notice. This is contrary to the record below, and was explicitly rejected by the court of appeals: "there is no evidence to establish that the defendants had actual notice of the suit."[85] Even now petitioners fail to point to anything that would prove otherwise.

If for no other reason, the Court should deny the petitions for writ of certiorari because petitioners failed to present below the questions they now seek to present to this Court and/or because, as framed, the questions are wholly unsupported by the record. The petitions, however, should also be denied for other reasons.

B. This Case Does Not Present any Genuine and Substantial Questions of Constitutional or Federal Law.

In any case, the questions petitioners present do not raise any genuine and substantial issues of constitutional or federal law. Whether a requirement of strict service of process could somehow, in some unlikely and remote circumstance, work a denial of access to the courts or due process; whether the Executive Branch has the right to make "judicial" [sic] determinations regarding sovereign immunity and service of process; whether service of process has been complied with strictly or substantially; and whether a general appearance by counsel at a TRO hearing waives any defect in service of process; these are all manifestly not genuine and substantial enough to require this Court's review.

The appeals court itself left the possibility open that, "under extraordinary circumstances not present in this case," methods other than strict service under FSIA § 1608(a) "might be sufficient."[86] The court, however, "decline[d] to define any such

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85. *Magness*, 247 F.3d at 618; A-15.

86. *Id.* at 616, n.15; A-11 at n.15.

exception until those extraordinary circumstances come before this court."[87]

There also is no question that the Executive Branch, be it through its State or Justice Departments, cannot be involved in "judicial determinations" over sovereign immunity, service of process or, for that matter, anything else. By definition, "judicial determinations" can and should only be made by the Judiciary.[88] And as petitioners rightly point out, by passage of the FSIA, Congress took any decision over sovereign immunity away from the State Department and placed it in the courts.[89] This, however, does not mean Congress cannot delegate to the State Department, or the State Department cannot play, a role in the service of process of foreign governments. No genuine and substantial question exists that Congress and the State

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87. *Id.*

88. U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

89. *See, e.g.*, *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998) ("In 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation. . . . Difficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules."); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) ("From the Nation's founding until 1952, foreign states were generally granted . . . complete immunity from suit in United States courts, and the Judicial Branch deferred to the decisions of the Executive Branch on such questions.") (citation omitted); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '(assure) litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"), *quoting*, H.R. Rep. No. 94-1487, at 7 (1976).

Department have such authority.[90] It also certainly does not mean that the Justice Department cannot enter an *amicus-curiae* appearance in support of a position taken by a foreign government, as it did before the court of appeals.[91]

There is also no genuine and substantial question that service of process must be complied with.[92] And whether it has or not (as in this case) been done depends upon questions of fact more properly relegated to courts other than this one.[93]

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90. *See, e.g., United States v. Mead Corp.*, __ U.S. __, __, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292, 303 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

91. *See* Fed. R. App. P. 29(a) ("The United States or its officer or agency . . . may file an amicus-curiae brief without the consent of the parties or leave of court").

92. *See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) (referring to the "bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) ("Service of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.").

93. *See, e.g., NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79 (1938) ("There is nothing

(Cont'd)

Finally, it has also been well established that waiver under the FSIA occurs "only when the sovereign/state fails to assert immunity in a responsive pleading'"[94] and, therefore, that no such waiver can occur from simply appearing at a TRO hearing before proper service was ever attempted much less perfected.

From this it should be clear that petitioners raise here no genuine and substantial issues of constitutional or federal law and that their petitions for writ of certiorari should, therefore, be denied. But their petitions should also be denied for the following reason.

C. There Is No Conflict Among the Courts of Appeals Requiring Resolution by this Court.

Petitioners maintain that there is a conflict in the Circuits over whether the service of process requirements of the FSIA must be complied with strictly or substantially. However, as the Fifth Circuit Court of Appeals explained, there is no conflict among the courts of appeals on what the FSIA requires.

The courts of appeals which have been presented with the issue agree that service on foreign states and their political subdivisions has to comply strictly with FSIA § 1608(a),[95] while

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(Cont'd)
in the lower courts' decision on either of the added questions to warrant review here. Whether respondents . . . are estopped depends on the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."); *FTC v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) ("Proper decision of the controversy depends upon a question of fact. . . . Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.").

94. *See, e.g., MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661-62 (5th Cir. 1996).

95. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) ("strict adherence to the terms of 1608(a) is (Cont'd)

service on those states' agencies and instrumentalities has to comply substantially with FSIA § 1608(b).[96]

(Cont'd)
required"); *Gerritsen v. Consulado General de México*, 989 F.2d 340, 345 (9th Cir. 1993) (suggesting plaintiffs must strictly comply with the service provisions on a foreign state under § 1608(a)); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (§ 1608(a) "delineates the 'exclusive procedure' for effecting service of process upon a foreign state"); *Magnus Elec., Inc. v. Royal Bank of Canada*, 620 F. Supp. 387, 389 (N.D. Ill. 1985), *aff'd in part, rev'd in part on other grounds*, 830 F.2d 1396 (7th Cir. 1987) ("noncompliance with the [FSIA]'s literal requirements (though it certainly did provide notice) deprives this Court of personal jurisdiction"); *Gray v. Permanent Mission of People's Republic of Congo to United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) (under § 1608(a) "informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements").

96. *Transaero*, 30 F.3d at 154 ("[t]he authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the [defendant]"); *Straub v. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994) (under § 1608(b), "the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance"); *Sherer v. Construcciones Aeronáuticas*, 987 F.2d 1246, 1249 (6th Cir. 1993) (substantial compliance is appropriate test under § 1608(b) where defendant had answered Complaint and raised 21 affirmative defenses); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982) (actual notice overrides technical deficiencies in service under § 1608(b)); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981) ("[r]ather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to service foreign entities."); *Obenchain Corp. v. Corporación Nacional de Inversiones*, 656 F. Supp. 435, 437 (W.D. Pa. 1987), *aff'd in part, rev'd in part on other grounds*, 898 F.2d 142 (3d Cir. 1990) ("Service of process [under § 1608(b)] did not comply with the FSIA, but will suffice where actual notice was received.").

While, as recognized by the appeals court, some district courts have held differently,[97] there is no irreconcilable conflict among the courts of appeals. There being no conflict, there is no need for this Court to exercise its supervisory power.[98]

CONCLUSION

The Court should deny the petitions for writ of certiorari.

Respectfully submitted,

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97. *See, e.g.*, *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988) (requiring strict compliance under § 1608(b)); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473, 1479 (E.D.N.Y. 1986) (requiring that certain "exigencies" be present before excusing non-strict compliance with § 1608(b)); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 395 (E.D. Va. 1984) (noting that "this Court is directed to strictly interpret the requirements set forth in § 1608(b)").

98. Sup. Ct. R. 10(a).